BLACKMORE CO.
HAGAN ESTATES, INC.

IBLA 87-260 Decided March 20, 1989

Appeal from a decision of the Director, Office of Surface Mining Reclamation and Enforcement, finding that applicants did not have valid existing rights to surface mine coal in the Jefferson National Forest, Virginia.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

   Under the facts of this case, OSMRE properly applied the definition set forth in the permanent regulatory program approved for the Commonwealth of Virginia in determining whether applicants had valid existing rights to surface mine coal on lands located within a national forest.

2. Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

   An applicant for valid existing rights bears the burden of proving entitlement.

APPEARANCES: John M. Goldsmith, Jr., Alexandria, Virginia, for appellants; Joseph M. Oglander, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE LYNN

Blackmore Coal Company (Blackmore) and Hagan Estates, Inc. (Hagan; appellants), have appealed from a December 3, 1986, decision issued by the Director of the Office of Surface Mining Reclamation and Enforcement (Director; OSMRE), finding that appellants did not have valid existing rights (VER) to surface mine coal on certain lands located in the Jefferson National Forest, Virginia. Appellants had sought a determination that they had such rights pursuant to section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1272(e) (1982). 1/

1/ All further references to the United States Code are to the 1982 edition.

On March 9, 1937, the United States Department of Agriculture, Forest Service (FS), received by condemnation certain lands located in Wise and Scott Counties, Virginia, and owned by Hagan, for inclusion in the Jefferson National Forest. United State of America v. 16,168.6 acres of land in Wise and Scott Counties, Va., Hagan Estates, Inc., (W.D. Va. Mar. 9, 1937). 2/ The condemnation was subject to a mineral reservation which gave Hagan the right to mine and remove all valuable minerals, including coal, oil, gas, petroleum, and valuable metals.

According to Blackmore's submissions to OSMRE, E.M. Frederick & Associates, Inc. (Frederick), requested permission from the FS to prospect and mine for coal on part of the lands condemned from Hagan. By letter dated July 3, 1962, the FS sent Frederick a proposed permit for prospecting by earthmoving equipment. The FS noted that, under its interpretation of the deed through which the United States acquired this property, surface mining methods, including strip mining and auguring, were not allowed. 3/ Thus, the FS concluded that initial operations would have to be carried out under a cooperative study agreement, and the area to be disturbed would be limited to 30 acres. This agreement was received by Frederick, but was not executed, allegedly due to the death of E.M. Frederick shortly after its receipt.

Blackmore also stated that between April 1975 and March 1977, Consolidation Coal Company (Consolidation) worked with the FS to obtain drilling and road access permits. Blackmore asserts that even though Consolidation discovered minable coal reserves, it eventually abandoned its options because of statements by the FS that it could not process an application for surface mining. Blackmore's statements regarding Consolidation's actions relative to the area at issue are not supported by any documentation in the record.

2/ The chronology of events and title set forth in this opinion is intended only to show how the present situation arose and in no way constitutes a legal determination of title.

3/ The FS' concern was apparently based upon its research indicating that strip mining was not practiced in this part of Virginia until well into the 1940's. This research is documented in the present case record. The FS thus believed that extracting coal by strip mining methods was not contemplated by the 1937 conveyance and reservation.

Similarly, under 30 CFR 761.5(c) (44 FR 15342 (Mar. 13, 1979)), the interpretation of the terms of the instrument relied upon to establish valid existing rights under SMCRA was to be based upon usage and custom at the time and place at which the instrument came into existence, and a showing that surface coal mining was actually contemplated by the parties. This requirement was changed slightly in 48 FR 41349 (Sept. 14, 1983) to provide that the terms of the document were to be interpreted either in accordance with the statutory or case law of the state involved or, when no such law existed, in accordance with usage and custom at the time and place.

Although appellants argue that the FS was aware of strip mining in 1937, this general awareness would not necessarily answer the question of whether strip mining was within the contemplation of the parties to this particular conveyance, and this opinion does not address that issue.

On July 11, 1980, Hagan leased the reserved mineral rights in 9,973.89 acres of land, more or less, in Scott County, Virginia, to the W.P. Corporation (W.P.). The record does not disclose whether W.P. made any attempt to develop the mineral estate. On November 1, 1980, W.P. assigned all its interest in the coal lease to Blackmore. At some time prior to June 1983, Blackmore entered into discussions with the FS concerning the development of Hagan's reserved mineral rights.

By letter dated June 17, 1983, Blackmore wrote OSMRE stating that its discussions with the FS could not proceed without an OSMRE determination pursuant to section 522(e) of SMCRA, 30 U.S.C. | 1272(e), that it had VER to develop the mineral estate. Accordingly, Blackmore requested OSMRE to make such a determination.

After requesting and receiving additional supporting materials, OSMRE published notice in the Federal Register inviting public comments or other information that might be relevant to its determination of whether Blackmore had VER. The comment period remained open until December 3, 1984. 49 FR 44029 (Nov. 1, 1984). OSMRE received several requests for extensions of the comment period, and, by notice published in the Federal Register, extended the comment period "until further notice." 50 FR 4818 (Feb. 1, 1985).

By letter dated December 3, 1986, the OSMRE Director determined that appellants did not have VER as that term was used in section 522(e). The Director concluded that Blackmore did not satisfy the regulations implementing section 522, i.e., 30 CFR Parts 740-745, which required it to satisfy the requirements of the Virginia permanent regulatory program, and specifically section V761.5 of the Virginia Coal Surface Mining Reclamation regulations. As the Director stated, the Virginia permanent regulatory program defines VER as:

> (1) Those property rights in existence on August 3, 1977 that were created by a legally binding conveyance, lease, deed, contract, or other document which authorizes the applicant to produce coal by a surface mining operation; and
>
> (2) The person proposing to conduct surface coal mining operations on such lands either
>
> (i) Had made a good faith effort to obtain State and Federal permits necessary to conduct [a surface coal mining] operation on those lands on or before August 3, 1977. [or]
>
> (ii) Can demonstrate * * * that the coal is both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all permits were obtained prior to August 3, 1977.

The Director emphasized that, under appellants' circumstances, there were two requirements for a finding of VER under the Virginia definition; i.e.,

a property right and a good faith effort to obtain all necessary permits. 4/ After examining appellants' attempts to develop this property, the Director concluded that "there is no evidence that as of August 3, 1977, there had ever been a serious effort to obtain all the permits necessary to mine the coal" (Decision at 3). Because of this finding, the Director found it unnecessary to discuss whether appellants had property rights in existence on August 3, 1977, to surface mine the coal.

On appeal, appellants argue:

> No question has been raised about our property right or title; just did we have all permits by an arbitrary date subsequent to condemnation where the condemnor's express document granted stripping rights. In September 1983 OSM[RE] recognized that the "all permits" test did not satisfy the objective that Congress had in mind when it included in Section 522(e) the stipulation that those with valid existing rights be allowed to conduct surface mining on federal lands and the OSM[RE] found that new regulations were required to avoid takings "for which compensation would be required through application of the prohibitions in section 522(e)." See 48 Fed. Reg. at 41,313 and 30 CFR 761.5 (September, 1983).
>
> * * * It seems odd that we lack VER because we didn't get permits from Virginia which couldn't issue them. It is further highly questionable that OSM[RE] can point to Virginia's OSM[RE]-dictated definition when OSM[RE] only has that responsibility for Federal issues and there is considerable doubt, according to Virginia's Attorney General's Office, that Virginia could have issued a permit on Federal lands on August 3, 1977. Further, OSM[RE]'s imposition of the "all permits" test violates the Administrative Procedure Act since it was announced without comment or notice.

(Statement of Reasons at 1-2).

Subject to a proviso not relevant here, 30 U.S.C. | 1272(e) provides: "After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted-- * * * (2) on any Federal lands within the boundaries of any national forest." SMCRA does not define VER. The attempts by the Secretary of the Interior to define VER have been the subject of several court cases.

The initial rule defining VER incorporated a two-part test: the claim had to be based on property rights in existence on August 3, 1977, and the person proposing to conduct surface coal mining operations had to have all

4/ The Director also noted the possibility that VER might be found where the tract at issue was adjacent to an on-going mining operation and gave appellants an opportunity to demonstrate that they met this standard. Appellants have attempted no such showing.

State and Federal permits necessary to conduct operations (the "all permits" test), unless the coal was both needed for and adjacent to an on-going surface coal mining operation. See 44 FR 15312, 15342 (Mar. 13, 1979). This definition was challenged in In Re: Permanent Surface Mining Regulation Litigation, 14 E.R.C. 1083 (D.D.C. 1980). The district court remanded the "all permits" test to the extent it denied VER status to applicants who had made good faith efforts to obtain permits on or before August 3, 1977. Id. at 1090. 5/

The remanded definition was suspended by notice published on August 4, 1980. The suspension notice provided that "[p]ending further rulemaking, the Secretary will interpret this regulation as requiring a good faith effort to obtain all permits" before August 3, 1977. 45 FR 51548 (Aug. 4, 1980).

On June 10, 1982, OSMRE proposed several alternative definitions of VER. 47 FR 25278, 25279-81 (June 10, 1982). On September 14, 1983, a new Federal definition of VER was adopted. This definition provided

> that a person possesses valid existing rights * * * if the application of any of the prohibitions contained in [section 522(e)] to the property interest that existed on that date would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

48 FR 41312, 41349 (Sept. 14, 1983) (the "taking" test).

The September 14, 1983, definition of VER was successfully challenged in In Re: Permanent Surface Mining Regulation Litigation, 22 E.R.C. 1557 (1985). The court found the rule defining VER was improperly promulgated because it was so different from the definitions proposed on June 10, 1982, that, under 5 U.S.C. | 553, the Department was required to repropose the definition and allow additional public comment. On November 20, 1986, the "taking" test was suspended, effective December 22, 1986. 51 FR 41954 (Nov. 20, 1986). In the suspension notice, which is still in effect, OSMRE stated at pages 41954-55:

> Suspending the rule has the effect of undoing the improper promulgation and leaving in place the VER test in use before the 1983 definition was promulgated. The test was the 1979 test, * * * as modified by the August 4, 1980 suspension notice which implemented the District Court's February 1980 opinion in In Re: Permanent (I) (the 1980 test) [14 E.R.C. 1083 (D.D.C. 1980)]. The suspension notice stated that pending further rulemaking OSMRE would interpret the regulation as including the court's suggestion that a good faith effort to obtain all permits would establish VER. * * *

5/ The court specifically declined to consider whether the "all permits" test was unconstitutional under the Fifth and Fourteenth Amendments on the grounds that no party had asserted a present constitutional violation. 14 E.R.C. at 1090.

* * * * * * *

> During the period of the suspension OSMRE has decided, consistent with 30 CFR 740.11(a), to make VER determinations on Federal lands * * * using the VER definition contained in the appropriate State or Federal regulatory program.

Further rulemaking to define VER has not yet been concluded. 6/

Concurrent with OSMRE's rulemakings to define VER, the Commonwealth of Virginia was developing its own permanent regulatory program. In December 1981, Virginia's program was conditionally approved. 46 FR 61088, 61114 (Dec. 15, 1981). The conditional approval stated:

> Beginning on [December 15, 1981], the Department of Conservation and Economic Development, Division of Mined Land Reclamation, shall be deemed the regulatory authority in Virginia for all surface coal mining and reclamation operations and all exploration operations on non-Federal and non-Indian lands. Only surface coal mining and reclamation operations on non-Federal and non-Indian lands shall be subject to the provisions of the Virginia permanent regulatory program.

30 CFR 946.10 (1982); 46 FR at 61114. Virginia's program has been amended and clarified several times. On June 6, 1983, the limitation restricting the application of the Virginia permanent regulatory program to operations on non-Federal and non-Indian lands was removed. 30 CFR 946.10 (1983); 48 FR 25184, 25186 (June 6, 1983). The effective date of the Virginia program has remained December 15, 1981. 51 FR 42548, 42554 (Nov. 25, 1986).

Pursuant to section 523(c) of SMCRA, 30 U.S.C. | 1273(c), 7/ and 30 CFR Part 745, on March 26, 1982, Virginia filed a formal request with the Secretary for a cooperative agreement giving it authority to administer its approved permanent regulatory program on Federal lands within the Commonwealth. With some changes from the original submission, Virginia's proposed cooperative agreement was published as a proposed rule in the Federal Register. 48 FR 29545 (June 27, 1983). On April 7, 1987, the cooperative agreement was published as a final rule with an effective date of May 7, 1987. 30 CFR 946.30 (1987); 52 FR 11044, 11049 (Apr. 7, 1987). In accordance with

6/ Two new definitions of VER were proposed in December 1988. 53 FR 52374 (Dec. 27, 1988).

7/ Section 523(c) states in relevant part:

"Any State with an approved State program may elect to enter into a cooperative agreement with the Secretary [of the Interior] to provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State, provided the Secretary determines in writing that such State has the necessary personnel and funding to fully implement such a cooperative agreement in accordance with the provisions of this Act."

the reservation of authority set forth in 30 CFR 740.4(a)(4) and 745.13(o), the preamble to the final rule publication contains the following statement:

> [C]ertain responsibilities under SMCRA that are reserved to the Secretary are not delegated by this agreement, such as * * * [determinations of] valid existing rights [on Federal lands]. Requests for determinations of valid existing rights will be processed in accordance with the District Court opinion in In Re: Permanent Surface Mining Regulation Litigation II, Civil Action No. 79-1144 (D.D.C.; March 22, 1985) [22 E.R.C. 1557 (D.D.C. 1985)].

With this background, the basic question for decision is what test for determining VER should have been applied for Federal lands located in Virginia on December 3, 1986, the date of the decision in this case. Appellants argue that OSMRE should have applied the "taking" test set forth in the September 14, 1983, rule. This argument is without merit for two reasons. First, even if the Federal definition of VER were applied in this case, the court found the rule establishing the "taking" test was not properly promulgated. Although it was some time after the court's remand before the Department published notice of the suspension of the "taking" test, the Department could not apply that test after March 22, 1985, the date of the court's decision. Second, and more importantly, we find, as discussed infra, that the Virginia definition of VER should be applied in this case, rather than the Federal definition.

OSMRE contends under two alternative rationales that the Virginia definition should be applied. First, OSMRE argues that the Virginia definition should have been applied from the initial consideration of appellants' application for VER. Second, OSMRE asserts that the Virginia definition should be applied under the November 20, 1986, suspension notice.

We will deal with OSMRE's second argument first. The November 20, 1986, suspension notice did not become effective until December 22, 1986. The suspension notice cannot be applied because it simply was not in effect at the time of the decision in this case.

[1] OSMRE also argues that the decision should have initially been made under Virginia law. 8/ OSMRE's argument is based on 30 CFR 740.11, which provides in pertinent part: "(a) Upon approval or promulgation of a regulatory program for a state, that program and this subchapter shall apply to: * * * (3) Surface coal mining and reclamation operations on lands where either the coal to be mined or the surface is owned by the United States." 48 FR 6912, 6936 (Feb. 16, 1983), as amended by 48 FR 44777, 44779 (Sept. 30, 1983).

8/ In this regard, OSMRE asserts that it erred when it indicated in the November 1984 Federal Register notice requesting comments on appellants' application for VER that the determination would be made under the Federal definition. 49 FR 44029 (Nov. 1, 1984) ("The term 'valid existing rights' is defined in 30 CFR 761.5 (48 FR 41312-41356; September 14, 1983))."

As noted supra, Virginia's permanent regulatory program has been approved since December 15, 1981. Under 30 CFR 740.11(a)(3) and as a result of the June 6, 1983, Federal Register notice removing the restriction against application of Virginia's program on Federal lands, Virginia's permanent regulatory program applies to Federal lands located within the Commonwealth. Although Virginia lacked authority to administer its approved program on Federal lands until May 7, 1987, and still does not have authority to make a determination of VER on Federal lands, its permanent regulatory program definition of VER should be applied on Federal lands within the Commonwealth. Accordingly, we find that under the facts of this case, OSMRE properly applied the definition of VER set forth in Virginia's permanent regulatory program. 9/

[2] Appellants bear the burden of proving their good faith efforts to obtain all necessary State and Federal permits. The record reflects that appellants, or their predecessors-in-interest or agents, attempted to obtain FS permission to conduct surface mining operations in 1962 and in 1975-77. The 1962 attempt resulted in a proposal to allow coal exploration. That proposal was never executed and, in the 15 years between 1962 and 1977, no further attempts were made to commence operations under the proposal. One attempt to obtain permission to conduct surface coal mining operations which resulted in permission only to explore for coal, which permission was never acted upon in any way for 15 years, does not constitute a good faith effort to obtain all necessary State and Federal permits.

The 1975-77 attempts of Consolidation to mine the area appear only in a statement made by Blackmore. There is no corroborating documentation regarding these efforts. It is clear, however, from Blackmore's own statements that Consolidation decided to let its options lapse, and that neither appellant took any further steps on their own to challenge the FS' alleged statements that it could not process an application for surface mining, to determine what agency or agencies were responsible for issuing the necessary State and Federal permits, or even to determine what permits were required. Appellants' statement that the Virginia Attorney General doubted the Commonwealth's authority to issue a mining permit on Federal lands on August 3, 1977, does not show compliance with other State permit requirements. Neither is there a showing that appellants attempted to obtain any Federal permits that were necessary in addition to surface mining permits.

Accordingly, we find that appellants have not shown that they made a good faith attempt to obtain all State and Federal permits necessary to surface mine this coal before August 3, 1977. OSMRE properly denied the request for VER. 10/

9/ Because of this finding and the history of publication of the Virginia permanent regulatory program in the Federal Register, we find appellants' argument that OSMRE imposed the "all permits" test in violation of 5 U.S.C. | 553 to be without merit.

10/ Because of this finding, we do not address the question of whether appellants had the right to extract this coal by surface mining methods, also a requirement of the Virginia definition of VER.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director of OSMRE is affirmed.

Kathryn A. Lynn
Administrative Judge
Alternate Member

I concur:

Wm. Philip Horton
Chief Administrative Judge